No. 7968

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MOCK GUM YING,

Appellant,

vs.

EDWARD W. CAHILL, as Commissioner of Immigration and Naturalization for the Port of San Francisco,

Appellee.

BRIEF FOR APPELLEE.

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STATEMENT OF THE CASE.

This appeal is from an order of the United States District Court for the Northern District of California denying a petition for a writ of habeas corpus (T. 15).

FACTS OF THE CASE.

Appellant was born in China on March 4, 1914. Her father was an alien and her mother a citizen. The Board of Special Inquiry found appellant to be an alien, and inadmissible to the United States (Ex. A, p. 56) under the Chinese Exclusion Act, and under the Immigration Acts of 1917 and 1924 (8 USCA, Sections 265, 136 (o), 136 (d), 213 (c)). That decision

was affirmed by the Secretary of Labor on appeal (Ex. A, pp. 79, 78, 77 and 76).

THE ISSUE.

Appellant's contention is that she is a citizen of the United States because her mother was a citizen.

ARGUMENT.

APPELLANT IS NOT A CITIZEN OF THE UNITED STATES.

Appellant claims to be a citizen of the United States by virtue of the second clause of Section 4 of the Act of April 14, 1802 (2 Stats. L. 155; 8 USCA, Sec. 7). For clarity we quote the two clauses of that section separately:

> "*(1st clause)* The children of persons who have been duly 'naturalized[1] under any law of the United States, or who, previous to the passing of any law on that subject, by the government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof;
>
> "*(2nd clause)* and the children of persons, *who now are, or have been,* citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; * * *."[2]

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1. The words "who have been" did not appear in the first clause as originally enacted—2 St. L. 155.

2. Italics and parenthetical matter supplied, here and elsewhere.

The fallacy of appellant's argument lies in her failure to observe that although the *first* clause of this statute is prospective, the *second* clause is not. The authorities are unanimously to that effect.

In

U. S. v. Wong Kim Ark, 169 U. S. 649 at 673, 674, 18 S. Ct. 456, 466, 42 L. Ed. 890, 899,

the Supreme Court pointed out that although the first clause includes children of persons thereafter naturalized, the second clause does not include foreign-born children of any person who became a citizen since its enactment. The Court said:

> "The provision of that act, concerning 'the children of persons duly naturalized under any of the laws of the United States', not being restricted to the children of persons already naturalized, might well be held to include children of persons thereafter to be naturalized. 2 Kent Com. 51, 52; *West v. West,* 8 Paige 433; *United States v. Kellar,* 11 Bissell 314; *Boyd v. Thayer,* 143 U. S. 135, 177.
>
> "But the provision concerning foreign-born children, being expressly limited to the children of persons who then were or had been citizens, *clearly did not include foreign-born children of any person who became a citizen since its enactment.* 2 Kent Com. 52, 53; Binney on Alienigenae, 20, 25; 2 Amer. Law Reg. 203, 205. Mr. Binney's paper, as he states in his preface, was printed by him in the hope that Congress might supply this defect in our law."

After pointing out that in accordance with Mr. Binney's suggestions Congress enacted the Act of Febru-

ary 10, 1855 (8 USCA, Section 6) conferring citizenship upon foreign-born children whose *fathers,* at the time of the children's birth, were citizens, the Supreme Court went on to say:

> "It thus clearly appears that, during the half century intervening between 1802 and 1855, there was no legislation whatever for the citizenship of children born abroad, during that period, of American parents who had not become citizens of the United States before the act of 1802."

In

Weedin v. Chin Bow, 274 U. S. 657, at 663, 664, 47 S. Ct. 772, 774, 71 L. Ed. 1284, 1287,

the Supreme Court again considered the second clause of Section 4 of the Act of 1802, supra, and after referring to portions of Mr. Binney's article published in 1853, which apparently brought about the enactment of the Act of February 10, 1855, supra (R. S. 1993; 8 USCA, Section 6), the Court said:

> "Mr. Binney demonstrates that, under the law then existing, the children of citizens of the United States born abroad, and whose parents were not citizens of the United States on or before the 14th of April, 1802, were aliens, because the Act of 1802 only applied to such parents, and because, under the common law which applied in this country, the children of citizens born abroad were not citizens but were aliens."

In

State ex rel. Phelps v. Jackson, 65 A. 657, 660, 79 Vt. 504, 8 L.R.A (N.S.) 1245, 1248,

the Supreme Court of the State of Vermont, construing the second clause of Section 4 of the 1802 Act, said:

> "It only applied to persons whose parents were citizens in 1802, or had been previous to that time. Samuel Nelson's father was not born until 1810, and so did not come within its terms. Yet this law remained on the statute books with its limitations and defects apparently undiscovered until Mr. Horace Binney published, in the American Law Register, vol. 2, p. 193, a vigorous article on the subject which induced the passage of act February 10, 1855, chap. 71, sec. 1, 10 Stat. at L. 604, U. S. Comp. Stat. 1901, p. 1268, which reads as follows: 'All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

It is clear from those cases and from the express language of the statute of 1802 that the second clause thereof, relative to "the children of persons *who now are, or have been,* citizens of the United States", has no application to the children of persons born after the enactment of that statute. We know of no decision to the contrary. The language quoted by appellant from *U. S. v. Kellar,* 13 F. 82; *Boyd v. Nebraska,* 143 U. S. 135, 12 S. Ct. 375, 36 L. Ed. 103, and *Zartarian v. Billings,* 204 U. S. 170, 27 S. Ct. 182, 51 L. Ed. 428, has reference solely to the first clause of the section, regarding children of persons "duly naturalized".

The first clause did not limit its application to children of persons theretofore naturalized but did require that the naturalization of the parents be

during the child's minority and that the child be dwelling in the United States. Appellant does not claim to be within the terms of that clause, and obviously she is not. Even if her mother were a person "duly naturalized", appellant is not "dwelling in the United States". It is settled that one who is found upon application for admission into the United States to be of a class excluded by the immigration laws cannot derive citizenship under that clause, because never having legally landed she could not be "dwelling in the United States".

Kaplan v. Tod, 267 U. S. 228, 230, 45 S. Ct. 257, 69 L. Ed. 585, 587;

Zartarian v. Billings, supra.

The second clause of the section, as has already been shown, was expressly limited to the children of persons *"who now are or have been"* citizens. The re-enactment and incorporation of this provision into Section 2172 of the Revised Statutes of 1874 did not change this language, and hence does not affect the case at bar, because appellant's mother was not born until 1884. So far as the incorporation of the section into the present "United States Code" is concerned, it is only necessary to point out that Section 2(a) of the Codification Act of June 30, 1926 (Title 1, USCA, p. 4) provides that

> "nothing in this Act shall be construed as repealing or amending any such law or as enacting as new law any matter contained in the Code."

Manifestly, therefore, appellant is not a citizen under either clause of the statute cited. Being of foreign birth, her right to American citizenship, if

any she has, must be found in the terms of an Act of Congress, "for, wanting native birth, she cannot otherwise become a citizen of the United States" (*Zartarian v. Billings,* supra, at p. 173), and "as this subject is entirely within Congressional control, the matter must rest there; it is only for the Courts to apply the law as they find it" (Id. p. 176).

After it had been brought to the attention of Congress that many children of citizens, born while their parents were visiting abroad, were aliens, because the second clause of the Act of 1802, supra, was limited to children of persons who were *in esse* and were citizens on the date of the passage of said Act, Congress passed the Act of February 10, 1855 (R. S. 1993, 8 USCA, Section 6). However, in said Act Congress specifically limited the grant of citizenship to foreign born children whose *fathers* were citizens at the time of the children's birth. Appellant derives no rights from that statute, because her father was never a citizen of the United States. It was not until the amendment of May 24, 1934 (8 USCA, Sec. 6—1934 Supp.) that Congress chose to confer citizenship upon foreign born children "whose father *or mother* or both, at the time of the birth of said child, is a citizen of the United States", and that amendment specifically limits its application to children *"hereafter* born", and contains the further limitation that where one parent is an alien, the child must come to the United States and reside therein for at least five years continuously immediately previous to its eighteenth birthday. Appellant is likewise not within the terms of that amendment.

Now if, as appellant contends, the second clause of Section 4 of the Act of 1802, supra, is prospective, then under that Act any foreign-born child of any American citizen is a citizen. If this were correct, why the necessity of enacting the Act of 1855, declaring to be citizens foreign-born children, theretofore or thereafter born, whose *fathers* at the time of the birth were citizens and had resided in the United States? And why the necessity of enacting the 1934 amendment of the latter Act to declare that foreign-born children thereafter born are citizens if either parent is a citizen at the time of the child's birth, provided the child comes to the United States and resides therein for five years before attaining the age of eighteen?

The Act of 1855 (R. S. 1993) must have been passed for one of two reasons: either (1) because the Act of 1802 was not prospective, or (2) because Congress considered it to be prospective and desired to place new restrictions upon its operation.

We submit that only the first of these hypotheses is tenable. Appellant does not argue that the Act of 1855 purported to govern a situation which was already covered by the Act of 1802. And if it were so intended appellant clearly would be out of Court by virtue of the later enactment, because her father was an alien. Nor can it be successfully contended that the Act of 1855 was intended to be applicable only to children of *foreign-born* citizens. The proviso that the right of citizenship should not descend to persons whose fathers had never resided within the

United States likewise appeared in the Act of 1802 as originally enacted (2 Stats. L. 155), as indeed it had appeared in all the earlier nationality Acts from 1790 forward (*Weedin v. Chin Bow,* supra, at pages 661 and 662). Those previous Acts were repealed by the Act of 1802, supra (Id. p. 662—2 Stats. L. 155, Sec. 5).

It is obvious, therefore, from the language of the Act of April 14, 1802, as well as from the authorities and the subsequent course of legislation on the subject, that the second clause of Section 4 of that Act was not prospective and that the Act of 1855 was passed for that very reason, and for the purpose of fixing the status of foreign-born children of American citizens other than those who were citizens on April 14, 1802.

Appellant argues that there was no reason why Congress should provide in the Act of 1802 for citizenship of the foreign-born children of persons thereafter naturalized in the United States and at the same time refuse to provide for citizenship of the foreign-born children of persons thereafter born in the United States. But as stated by the Supreme Court in a similar situation in

> *Chung Fook v. White,* 264 U. S. 443 at 446; 44 S. Ct. 361, 362, 68 L. Ed. 781, 782:
>
> "The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results, as forcefully contended, the remedy lies with Congress and not with the courts. Their duty is

simply to enforce the law as it is written, unless clearly unconstitutional."

Appellant represents the Secretary of Labor as holding that "inasmuch as the child of a naturalized parent must dwell in the United States in order to acquire citizenship, the child of a native-born parent must also dwell in the United States", and states that the Secretary of Labor "relies" in this connection upon the Act of March 2, 1907, as amended (8 USCA, Sec. 8—1934 Supp.).

What the Secretary of Labor actually held (Ex. A, pp. 78, 77 and 76) is this:

(1) That appellant cannot be a citizen under the second clause of the Act of 1802, supra, because that clause is limited in terms to the children of parents who were at the time of its enactment, or had previously been, citizens of the United States;

(2) That appellant cannot be a citizen under Section 1993 of the Revised Statutes because that section as in force at the time of her birth covered only children whose fathers were citizens; and

(3) That appellant cannot be a citizen under the Act of March 2, 1907, as amended, even though her mother should be treated as one who resumed citizenship during the minority of appellant, because under that Act "the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States", and because appellant, being of an excluded class,

cannot begin to reside in the United States within the meaning of said Act (*Kaplan v. Tod,* supra).

In other words, the Secretary of Labor separately considered the possibilities of appellant being a citizen either under the Act of 1802, or under the Act of 1855, or under the Act of 1907, and found that because of the respective qualifying and restricting provisions in each Act appellant is not within the terms of any of them. Since the inapplicability of any of those statutes with the exception of the second clause of Section 4 of the 1802 Act is conceded by appellant, we are brought back to the question whether that particular clause of that statute is prospective. The United States Supreme Court has twice pointed out that it is not, and neither the language of the Act itself nor the course of legislation on the subject would permit of any other conclusion.

Reference is made in appellant's brief and in the Secretary of Labor's decision to an opinion of the Attorney General (37 Op. Atty. Gen. 90). That opinion simply holds that under the Act of March 2, 1907 (8 USCA, Section 8), the minor child of an American citizen who married an alien but who did not thereby lose her citizenship should be considered as in the same position for purposes of that Act, as a child whose mother had lost citizenship by marrying an alien, and resumed it during the child's minority. Of course, that holding does not affect appellant's case, because, as pointed out by the Secretary of Labor, the Act there under consideration, as amended, leaves the minor child in the position

of an alien until it shall have resided permanently in the United States for five years during minority, and because appellant, being inadmissible into the United States as an alien, cannot begin to reside in the United States within the meaning of that Act (*Kaplan v. Tod,* supra).

Nor does the opinion of the Attorney General lend any support to the proposition that the second clause of Section 4 of the 1802 Act, supra, should be construed prospectively in order to place children of American-born parents in as favorable position under that statute as children of persons who have been naturalized. As already pointed out, appellant could not qualify under the provisions of the 1802 statute if her parents were naturalized citizens, because she is not, and cannot be, "dwelling in the United States" (*Kaplan v. Tod,* supra). And so far as the second clause of the section is concerned, the restriction of the grant of citizenship to those who are children of persons "who now are, or have been" citizens, was definite and specific. Certainly provision for citizenship of foreign-born children of other classes of citizens cannot be read into that statute. The matter was and is wholly within Congressional control. Moreover, it is interesting to observe that not until 1934 did Congress choose to make specific provision for the descent of citizenship by virtue of birth abroad to an American mother, and when it did so provide in 1934, the amendment contained very definite limitations. Everything in the history of the nationality legislation discussed above is opposed to the propo-

sition that by the second clause of Section 4 of the Act of 1802 Congress made citizens of every child born abroad whose mother was either then or thereafter a citizen.

Finally appellant argues that the action of the immigration authorities in heretofore admitting her brother and sister as citizens of the United States is entitled to serious consideration as evidence of the policy of the executive department and of the executive construction heretofore placed upon the statute.

The rule that a definitely settled administrative construction which has been acted upon for a number of years will not be disturbed except for cogent reasons is not applicable to cases where the construction is not doubtful, or where the interpretation has not been uniform, but in such cases will be taken into account only to the extent that it is supported by valid reasons.

> *U. S. v. Missouri Pacific Railroad Company,* 278 U. S. 269, 280, 49 S. Ct. 133, 137, 73 L. Ed. 322, 378.

In the case at bar the decisions admitting appellant's brother and sister as citizens of the United States were made by the local immigration officers without any discussion whatever of the theory upon which they found that those two foreign-born children were citizens of the United States, and without any ruling being obtained from the Department at Washington (Ex. F. pp. 11, 35, 40; Ex. H, pp. 11, 35, 40). It is obvious therefore that here no definitely settled or uniform construction by the executive department is involved, but on the contrary the action

of the local immigration officers in the cases of appellant's brother and sister involved simply an erroneous assumption without any definite consideration of the pertinent legal questions. Furthermore, it is obvious that the construction of the Act of 1802 is not doubtful but has long been settled.

CONCLUSION.

We submit that appellant is not a citizen of the United States under any of the statutes, and that the order of the lower Court denying her petition for writ of habeas corpus was correct and should be affirmed.

Dated, San Francisco,
December 30, 1935.

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